

MEMO:

To: City of Bloomington Common Council
From: Adam Wason, Deputy Mayor
Danise Alano-Martin, Economic & Sustainable Development Director
Patty Mulvihill, City Attorney
Date: February 19, 2015
Re: Mobile Food Vendors, Pushcarts & Solicitors

When the City Administration first brought forward legislation regarding the regulation of mobile food vendors, pushcarts and solicitors it did so for one primary reason, the current regulations in Title 4 are considered to be ineffective, inefficient and confusing for City staff, the licensed vendors, brick and mortar businesses and the community at large. For example, if a mobile food vendor has permission to operate his or her truck on a private parking lot, the operator not only needs a business license under Title 4 of the BMC, the operator also needs a Temporary Use Permit under Title 20 of the BMC. Second, the current Title 4 ordinance often times leaves citizens, potential businesses and staff confused as to what type of license is needed—itinerant merchant, solicitor or peddler. Third, the current ordinance does not permit the City to hold special events that involve more than one mobile food vendor or pushcart operator. These examples are just a sampling of the difficulties posed by the current regulation.

During the presentation and discussion of the Administration's proposal in 2014 there were several amendments put forth which the Administration supported. Each of those amendments, described below, has been incorporated into the Administration's 2015 proposal.

- Sections 4.16.050; 4.28.160; and 4.30.150, entitled "Standards of Conduct". The following language was added to explain what the ordinance means when it refers to "aural means" or "light producing devices": *(examples of such devices may include, but are not meant to be limited to the following: bull horns and strobe lights).*
- Sections 4.16.160; 4.28.180; and 4.30.170, entitled "Penalties-Revocation of License". A new subsection, subsection (c), was added to specifically codify that enforcement officials have the authority to issue a warning for a first-time violation.
- Sections 4.28.010 and 4.30.010, entitled "Definitions" and Sections 4.4.28.140 and 4.30.130, entitled "Location Restrictions". The sections were amended to delete any reference to specific districts (Courthouse Square District; Kirkwood District; and Restaurant Row District) and specific limitations on mobile food vendors and pushcarts in those districts.
- Sections 4.28.030 and 4.30.030, entitled "Business License-Required". The ordinance now allows a mobile food vendor or pushcart who participates in a Special Event to locate anywhere within the Special Event's boundaries, even if

that location is within fifty feet of a ground floor establishment that sells food or beverages.

- Sections 4.28.050 and 4.30.05, entitled "Business License-Prerequisites". The ordinance no longer requires mobile food vendors and pushcarts to supply the City with manufacturer specifications on any generators used by said businesses.
- Sections 4.28.140 and 4.30.130, entitled "Location Restrictions". The ordinance now specifies that mobile food vendors and pushcarts must locate fifty feet from both the facade of a ground level establishment that sells food or beverages and fifty feet from the perimeter of such an establishment's outdoor seating area.
- Sections 4.28.150 and 4.30.140, entitled "Prohibited Hours". The ordinance now only prohibits mobile food vendor units and pushcarts from operating on **public** property between the hours of 4:30 a.m. and 6:30 a.m.
- Sections 4.28.180 and 4.30.180, entitled "Restriction on Use". The Administration deleted the cap on the amount of licenses that the City may issue for mobile food vendor units and pushcarts.

During the discussion of the Administration's first proposal in 2014, there appeared to be three main areas of concern or contention: (1) noise levels of generators; (2) emission levels of generators; and (3) location restrictions or alternative locations for mobile food vendors and pushcarts. In response to the discussions put forward in 2014 the City's Administration spent a considerable amount of time researching each of the aforementioned issue areas. Staff is now able to provide the Common Council with additional information and the Administration's position on each of these issues.

Noise Levels of Generators

The Administration's original proposal was to limit generator noise to no more than 60 dbL. There were several concerns that this limit was too low and that the ordinance needed to contain specific instructions on how and where from the decibel level should be measured. In response to these concerns, and based upon data obtained from staff's research, the new proposal recommends limiting generator noise to no more than 70 dbL, establishes that the decibel level shall be measured from a distance of twenty-five (25) feet, and provides specific instructions on how the measurement is to occur. The specific ordinance language can be found at **Sections 4.28.160(v) and 4.30.150(v)**.

Staff reviewed sixty-four (64) cities and towns which regulate mobile food vendors, pushcarts or similarly situated businesses. Exhibits listing those cities and towns, along with their respective populations, and manner of noise regulation are included with this Memorandum as **Exhibits A and B**. Exhibit A lists the cities and towns in alphabetical order while Exhibit B lists the cities and towns in order of their respective populations.

Both exhibits show the following in regards to noise limitations:

- There are nine (9) cities or towns who also require 70 dbL.
- There are eleven (11) cities or towns who require lower decibel levels than the Administration's proposal.
- There are eight (8) cities or towns who permit a higher decibel level than the Administration's proposal.
- Three (3) cities or towns regulate the decibel in some relation to the ambient noise level near the generator.
- Eighteen (18) cities or towns have no known noise regulation for generators.
- Fifteen (15) cities or towns utilize a "reasonableness" standard for generator noise.

The exhibits also show the following in regards to how far away from the generator the noise level is to be measured:

- There is one (1) other city (Ames, Iowa) which measures the noise level from a distance of twenty-five (25) feet.
- There are eight (8) cities or towns who measure the level of noise from a shorter distance than the Administration's proposal.
- There are four (4) cities or towns who measure the level of noise from a greater distance than the Administration's proposal.
- There are nine (9) cities or towns who measure the level of noise from the adjacent property line.
- There are two (2) cities or towns who measure the level of noise from across the street from where the noise is being emitted.
- There are forty (40) cities or towns who do not have an established distance for measuring the noise level.

Thirty-five (35) of the sixty-four (64) cities and towns noted above are cities or towns which contain a publicly funded state university or college. Exhibits listing those cities and towns, along with their respective populations, associated college or university, school enrollment, and manner of noise regulation are included with this Memorandum as **Exhibits C and D**. Exhibit C lists the cities and towns in order of their respective populations while Exhibit B lists the cities and towns in order of their school's enrollment numbers.

Both exhibits show the following in regards to noise limitations:

- There are three (3) cities or towns who also require 70 dbL.
- There are seven (7) cities or towns who require lower decibel levels than the Administration's proposal.
- There are four (4) cities or towns who permit a higher decibel level than the Administration's proposal.
- Two (2) cities or towns regulate the decibel in some relation to the ambient noise level near the generator.
- Eight (8) cities or towns have no known noise regulation for generators.
- Ten (10) cities or towns utilize a "reasonableness" standard for generator noise.

The exhibits also show the following in regards to how far away from the generator the noise level is to be measured:

- There is one (1) other city (Ames, Iowa) which measures the noise level from a distance of twenty-five (25) feet.
- There are four (4) cities or towns who measure the level of noise from a shorter distance than the Administration's proposal.
- There are three (3) cities or towns who measure the level of noise from a greater distance than the Administration's proposal.
- There are seven (7) cities or towns who measure the level of noise from the adjacent property line.
- There is one (1) city or town who measure the level of noise from across the street from where the noise is being emitted.
- There are nineteen (19) cities or towns who do not have an established distance for measuring the noise level.

Emission Levels for Generators

The Administration's original proposal in 2014 did not specifically address or regulate emission levels for generators used by mobile food vendors or pushcarts. During the original proposals discussion staff was asked to determine if the City can legally regulate emission levels on generators and to consider if emission regulation is needed.

Ind. Code § 13-17-12-1(2) advises that the State of Indiana's air pollution control law do not prevent cities from adopting and enforcing ordinances which are more restrictive than the State's air pollution laws, provided the ordinance "further the expressed purpose of air pollution control laws". The stated purpose of the State's air pollution control laws is located at Ind. Code § 13-17-1-1 and reads as follow:

It is the intent and purpose of air pollution control laws to maintain the purity of the air resource of Indiana, which shall be consistent with protection of the public health and welfare and the public employment of the air resource, physical property and other resources, flora and fauna, maximum employment, and full industrial development of Indiana. The air pollution control board and the department shall safety the air resource through the prevention, abatement, and control of air pollution by all practical and economically feasible methods.

There have been no judicial interpretations on the above two Indiana statutes so staff cautions the Council on moving forward with an ordinance which regulates the emissions of generators.

In reviewing emission standards and how such standards are measured staff has determined that any such regulation would be too cumbersome and costly for the City to effectively administer and manage. The Administration's proposal does not recommend regulating the amount of emissions produced by generators. Instead, the Administration would prefer to see if its proposed distance restrictions provide enough of a safety net for pedestrians and users of the City's streets and sidewalks, and if not, then reevaluate if other regulatory avenues are available and advisable.

The Administration reached out to mobile food vendor units and pushcarts to determine what type of generators, if any, are being used by these businesses. As of today's date, the Administration has learned the following:

- All but three (3) licensed businesses provided the City with specific information on their generators.
- Eight (8) vendors utilize a gas powered generator.
- Seven (7) vendors do not utilize a gas powered generator, all but two (2) of those vendors are pushcarts.

Location Restrictions or Alternative Locations

Distance From Ground Level Establishments That Sell Food or Beverages

The Administration's 2014 proposal recommended prohibiting mobile food vendor units and pushcarts from operating within fifty (50) feet of any ground level establishment that sells food or beverages, and that if said establishment has an outdoor seating area, the fifty (50) feet be measured from the perimeter of the outdoor seating area. Mobile food vendors and pushcarts argued that the distance was too great; that they should be allowed to operate at any location of their choosing; or at a minimum they should be allowed to operate closer to a ground level establishment that sells food or beverages if said establishments provides permission. On the other side of the argument downtown businesses, community members and Common Council representatives pondered if fifty (50) feet is too close to ground level establishments and thought that seventy-five (75) feet may be more appropriate. Staff listened and reviewed all concerns raised, reviewed the regulations of other cities and towns, and determined that Administration stands behind its original proposal.

Staff reviewed sixty-four (64) cities and towns which regulate mobile food vendors, pushcarts or similarly situated businesses. Exhibits listing those cities and towns, along with their respective populations, and distance restrictions are included with this Memorandum as **Exhibits E and F**. Exhibit E lists the cities and towns in alphabetical order while Exhibit F lists the cities and towns in order of their respective populations.

Both exhibits show the following in regards to noise limitations:

- Five (5) cities or towns prohibit vendors from locating within fifty (50) feet of ground level establishments, like the Administration's proposal.
- Eighteen (18) cities or towns prohibit vendors from locating within **more than** fifty (50) feet of ground level establishments.
- Six (6) cities or towns prohibit vendors from locating on any **public** property.
- Three (3) cities or towns prohibit vendors from blocking a ground level establishment, parking adjacent to a ground level establishment, or parking on the same side of the street as a ground level establishment.
- Eight (6) cities or towns have no restrictions on where vendors may locate.
- Twenty (20) cities or towns provide exact and specific locations on where vendors may locate. Vendors may locate only in those locations and nowhere else.

Thirty-five (35) of the sixty-four (64) cities and towns noted above are cities or towns which contain a publicly funded state university or college. Exhibits listing those cities and towns, along with their respective populations, associated college or university, school enrollment, and location restrictions are included with this Memorandum as **Exhibits G and H**. Exhibit G lists

the cities and towns in order of their respective populations while Exhibit H lists the cities and towns in order of their school's enrollment numbers.

Both exhibits show the following in regards to noise limitations:

- Three (3) cities or towns prohibit vendors from locating within fifty (50) feet of ground level establishments, like the Administration's proposal.
- Nine (9) cities or towns prohibit vendors from locating within **more than** fifty (50) feet of ground level establishments.
- Four (4) cities or towns prohibit vendors from locating on any **public** property.
- Two (2) cities or towns prohibit vendors from blocking a ground level establishment, parking adjacent to a ground level establishment, or parking on the same side of the street as a ground level establishment.
- Two (2) cities or towns have no restrictions on where vendors may locate.
- Twelve (12) cities or towns provide exact and specific locations on where vendors may locate. Vendors may locate only in those locations and nowhere else.

In order to be able to visualize the permitted and prohibited locations in the downtown area the Administration has prepared two maps for the Common Council and public to review. The maps, attached as **Exhibits I and J**, delineate the meter locations where vendors can and cannot park. The maps are somewhat small, so to that end, the Administration has prepared larger maps that more clearly delineate the specific parking meter locations, also labeled **Exhibits I and J**, which will be available in the Common Council office for viewing and presented during the Common Council meetings concerning the proposed legislation.

To show the difference between a fifty (50) foot prohibition and a seventy-five (75) foot prohibition, the Administration has also prepared two maps which provide the permitted and prohibited parking spaces if the regulation is seventy-five (75) feet. Attached are **Exhibits K and L**, which delineate the meter locations where vendors can and cannot park in the downtown area. Again these maps are small so the Administration has prepared larger maps that more clearly delineate the specific parking meter locations, these maps are also labeled **Exhibits K and L**, which will be available in the Common Council office for viewing and presented during the Common Council meetings concerning the proposed legislation.

If the ordinance is adopted with these location restrictions in place, the City will mark those parking meters where mobile food vendor units are permitted to locate and conduct business. It is the Administration's belief that marking these parking meters will better assist the mobile food vendors units and citizens in knowing where the units can and cannot locate.

Locating Near Closed Ground Level Establishments That Sell Food or Beverages

Permitting mobile food vendor units and pushcarts to operate near or in front of closed ground level establishment that sell food or beverages creates ambiguity (which defeats the overall and primary purpose of this Title 4 update) and requires costly, if even feasible, administrative oversight.

- While it may seem reasonable to allow mobile food vendor units and pushcarts to locate in front of closed restaurants and bars, from a City staff perspective it creates a policy and environment that is unenforceable. One of the products resulting from this ordinance is a map of the downtown that shows where mobile food vendor units and pushcarts are allowed to park, based on the 50' rule (among others). This map will be an easy reference tool that aims to eliminate any ambiguity for mobile food vendors, City staff, the Bloomington Police Department, downtown businesses and the public with regards to where a food truck or pushcart may park.
- A policy that allows mobile food vendor units and pushcarts to locate within 50' of a ground level establishment that sells food or beverages when it is closed creates a "moving target" from an enforcement perspective. The map described within and attached to this Memo becomes virtually worthless if it is not accurate. As soon as a ground level establishment that sells food or beverages closes for the day the map will be incorrect and therefore not a good tool for enforcement. The allowable parking spaces need to be consistent.
- The only theoretically conceivable way to allow vendors to park in front of closed ground level establishments that sell food or beverages will be to create a different map for each hour of the day that will hopefully reflect allowable parking spaces for mobile food vendor units and pushcarts based on the hours of operation of said ground level establishments. Some of the aforementioned ground level establishments vary their hours based on the different days of the week (or times of the year, or presence or absence of basketball or football games, etc.), so in theory the City will need to create 168 different maps (24hrs/day x 7 days a week), and this still will not account for holiday hours, or new businesses opening or closing throughout the year.

Private Agreements with Ground Level Establishments That Sell Food or Beverages

Again, permitting mobile food vendor units and pushcarts to enter into private agreements with ground level establishment that sell food or beverages to operate inside the fifty (50) foot perimeter creates ambiguity (which defeats the overall and primary purpose of this Title 4 update) and requires costly, if even feasible, administrative oversight.

- Much like a policy of allowing mobile food vendor units and pushcarts to park in front of closed ground level establishments that sell food or beverages, allowing

them to have private agreements with such establishments that do not mind if they park less than 50' from their business will be difficult to track and monitor and therefore unenforceable.

- The main enforcement tool for where a mobile food vendor unit or pushcart is allowed to locate is the downtown map described and attached herein. This map is what enforcement officers will use to settle any dispute over location. If private agreements between mobile food vendors and ground level establishments that sell food or beverages are allowed this will have a direct impact on the accuracy of the map since the map will then not apply to all mobile food vendors. It is not technologically feasible to modify the map to reflect which specific mobile food vendors are allowed to park in front of which ground level establishments. It will muddy enforcement and ***leave mobile food vendors, City staff, BPD, downtown businesses and the public unclear about who can park where.*** A single map with universal rules is the best option.
- Another reason allowing private contractual agreements between ground level establishments and licensed vendors will be unfeasible is that said establishments do not have the right to dictate the use of the public right-of-way. If a ground level establishment can decide who is allowed to park in front of them (on a public street) this assigns legal power and discretion to the establishment that it ought not have.

Mobile Food Vendors and Pushcarts in Dunkirk Square Parking Lot

The Administration does not support using a publicly owned parking lot for use by private businesses on a regular and consistent basis. However, staff could support limited and the occasional use of such space during and for Special Events.

- Allowing mobile food vendor units and pushcart to utilize the City parking lot behind Dunkirk Square is feasible, but could potentially cause costs to be incurred by the City. Such potential costs, timing, impacts of each proposed use, and also the organizational and physical infrastructure needed must first be well understood.
- If the expectation is that utilizing this parking lot by the vendors is to be organized and run by City staff (which is not recommended or supported by the Administration), what resources are necessary for the event organization and where will these resources come from? (think Farmers' Market or Holiday Market – these things require dedicated staff time and significant resources to organize).
- Infrastructure costs are not known and the Administration does not support tax dollars being used to cover the cost of any such infrastructure.